

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 25, 2008

STATE OF TENNESSEE v. JENNIFER LESLIE PENDLETON

**Appeal from the Criminal Court for Sullivan County
No. S51, 275 R. Jerry Beck, Judge**

No. E2007-00578-CCA-R3-CD - Filed July 22, 2008

Following the Grand Jury of Sullivan County's presentment charging Appellant, Jennifer Leslie Pendleton, with four separate counts, including possession of cocaine over twenty-six grams, Appellant pled guilty as charged. She was sentenced to eight years for the possession of cocaine over twenty-six grams conviction. Her other convictions were for lesser crimes, and the sentences were ordered to run concurrently to the eight-year sentence. Appellant requested that she be placed on community corrections, relying on the special needs provision.¹ After a hearing, the trial court denied the request. On appeal, Appellant argues that the trial court erred in denying her request. After a thorough review of the record on appeal, we affirm the trial court's decision because Appellant is not legally eligible for community corrections based upon the special needs provision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. C. MCLIN, JJ., joined.

Richard A. Spivey, Kingsport, Tennessee, for the appellant, Jennifer Leslie Pendleton.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Greeley Wells, District Attorney General; and Joseph E. Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

¹Tennessee Code Annotated section 40-36-106(c), the so-called special needs provision of the Community Corrections Act provides:

(c) Felony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol or drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correction institution, may be considered eligible for punishment in the community under the provisions of this chapter.

OPINION

FACTUAL BACKGROUND

On October 12, 2005, the Grand Jury of Sullivan County charged Appellant by presentment with one count of possession of over twenty-six grams of cocaine for sale or delivery, one count of possession of marijuana, one count of possession of drug paraphernalia, and one count of maintaining a dwelling where controlled substances are used or sold. On September 29, 2006, Appellant pled guilty to all four counts as charged. As a result of the plea, Appellant received an eight-year sentence for possession of over twenty-six grams of cocaine, a Class B felony; eleven months and twenty-nine days for possession of marijuana, a Class A misdemeanor; eleven months and twenty-nine days for possession of drug paraphernalia, a Class A misdemeanor; and three years for maintaining a dwelling where controlled substances are used or sold, a Class D felony. All sentences were ordered to be served concurrently.

On March 9, 2007, the trial court held a hearing to determine Appellant's eligibility for alternative sentencing. Appellant specifically asked to be placed on community corrections because her conviction for possession of over twenty-six grams of cocaine, a Class B felony, made her ineligible for probation. Appellant testified at the hearing concerning her extended use of cocaine and marijuana and her sale of cocaine, which occurred during a two month period, to other people. She also testified that she is no longer taking illegal drugs, is gainfully employed, and has recently been promoted at her job. Her mother also testified that Appellant has turned her life around since her arrest and is no longer taking drugs. At the conclusion of the hearing, the trial court stated that it determined that Appellant would be eligible for community corrections under the special needs provision. However, the trial court denied community corrections and stated the following reasons:

Well, I'll just be quite frank with you. You've got 100 to 200 sales of cocaine which are minimum of Class B felonies that she's not even been convicted, but she admits doing. I mean, she's admitted up to 200. That's – and the officer . . .

This concerns me, too. When the officers got there, what kind of a drug operation was going on, the police officer, I think, seized her cell phone and they began taking calls for drugs. It was an ongoing – it wasn't just a . . .

. . . .

It was a big operation, the way I'm reading it. And I'm going back to officer – I believe it was Ferguson. I can't find it here now. But he said they got her phone when they went in the house and they began fielding drug calls. And I can't remember if he said how many, but . . .

. . . .

All right, that's the Court's concern. I – I realize she's young but, Holy Cow, 200 sales.

Now, the Defendant has one prior probation for a Class A misdemeanor theft, suspended sentence. Now, in addition, as to herself she did cooperate with the police that were there, gave a full statement, except down to never gave – evidently she wouldn't turn in her [supplier] – Mr. Pride.

. . . .

Okay, the Defendant is not an actual addict today. She could benefit from counseling to keep her from relapsing. The Court's of the opinion she would be eligible for Community Corrections. But she does have a prior suspended sentence. She has a prior [A] misdemeanor. She has sold hundreds of times by her own words. And I think it's just too much. That's too many people bought, too many people became – could become an addict because of what she was doing, up to 200 of them, I guess.

I'm going to deny Community Corrections, [Defense Counsel]. She'll be required to serve her sentence.

Appellant filed a timely notice of appeal.

ANALYSIS

Appellant's sole issue on appeal is that the trial court erred in denying her request for community corrections based upon the special needs provision of the Community Corrections Act. Because that is the sole issue on appeal, we restrict our review to the trial court's decision with regard to the special needs provision of the community corrections statute and make no conclusions regarding Appellant's eligibility for community corrections under any other provisions. "When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also

recognize that the defendant bears “the burden of demonstrating that the sentence is improper.” *Ashby*, 823 S.W.2d at 169.

Alternative Sentencing

In regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal history evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.

A defendant who does not fall within this class of offenders “and who is an especially mitigated offender or standard offender convicted of a Class C, D or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” T.C.A. § 40-35-102(6) (2006).² A defendant is eligible for an alternative sentence if his sentence is fewer than ten years in length. T.C.A. § 40-35-303.

As stated above, Appellant herein pled guilty to one count of possession of over twenty-six grams of cocaine, a Class B felony; one count of possession of marijuana, a Class A misdemeanor; one count of possession of drug paraphernalia, a Class A misdemeanor; and one count of maintaining a dwelling where controlled substances are used or sold, a Class D felony. Based upon the B felony conviction, Appellant is not a favorable candidate for alternative sentencing. T.C.A. § 40-35-303.

Community Corrections

Because Appellant was convicted of a drug-related, non-violent felony offense, however, she is eligible for, but not automatically entitled to, a community corrections sentence under the primary section of the Community Corrections Act. T.C.A. § 40-36-106(a); *State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1991). The Community Corrections Act was meant to provide an alternative means of punishment for “selected, nonviolent felony offenders . . . , thereby reserving secure confinement facilities for violent felony offenders.” T.C.A. § 40-36-103(1); *see also State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). Pursuant to statute, offenders who satisfy the following minimum criteria are eligible for participation in a community corrections program:

² The 2005 amendment removed language that provided that the described offenders were presumptively eligible for alternative sentencing in the absence of evidence to the contrary and made the guidelines “advisory” in nature.

- (A) Persons who, without this option, would be incarcerated in a correctional institution;
- (B) Persons who are convicted of property-related, or drug- or alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parties 1-5;
- (C) Persons who are convicted of nonviolent felony offenses;
- (D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
- (E) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
- (F) Persons who do not demonstrate a pattern of committing violent offenses; and
- (2) Persons who are sentenced to incarceration or are on escape at the time of consideration will not be eligible for punishment in the community.

T.C.A. § 40-36-106(a). Section (c) of this same statute, which is sometimes referred to as the “special needs” provision, states:

Felony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

Appellant specifically argues that she is entitled to a sentence under community corrections under the special needs provision and that the trial court erred by not placing her in community corrections based upon that reason. She did not argue concerning her eligibility for community corrections under any other provisions of the community corrections statute. *See* T.C.A. § 40-36-106.

As noted previously, although not automatically entitled to a community corrections sentence under Tennessee Code Annotated section 40-36-106(a), Appellant is eligible for one under that subsection. The express terms of Tennessee Code Annotated section 40-36-106(c) require ineligibility under subsection (a) to be eligible for placement under subsection (c). This alone disqualifies Appellant from a community corrections sentence.

Moreover, it is well-established that before being placed in community corrections based upon Tennessee Code Annotated section 40-36-106(c), an offender must first be eligible for regular probation. *State v. Cowan*, 40 S.W.3d 85, 86 (Tenn. Crim. App. 2000); *State v. Kendrick*, 10 S.W.3d 650, 655 (Tenn. Crim. App. 1999). Tennessee Code Annotated section 40-35-303(a) states in pertinent part that a defendant is not eligible for probation if convicted of Tennessee Code Annotated

section 39-17-417(i). Appellant pled guilty to a violation of Tennessee Code Annotated section 39-17-417(i). Therefore, Appellant is not statutorily eligible for regular probation. Because she cannot statutorily qualify for probation, Appellant cannot be placed in community corrections under the “special needs” provision.

CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court.

JERRY L. SMITH, JUDGE